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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNION SECURITY LIFE INSURANCE COMPANY, PETITIONER

v.

EVELYN CROCKER, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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13 pp

TABLE OF AUTHORITIES

Pages

Cases

American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997) 2

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) 1, 2, 9, 10

BMW of North America, Inc. v. Gore, 701 So. 2d 507 (Ala. 1997) 10

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 6

Ford Motor Co. v. Sperau, 1997 WL 545878 (Ala. Sept. 5, 1997) 9

Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) 2, 3

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) . . . 2, 3

Talent Tree Personnel Servs., Inc. v. Fleenor, 703 So. 2d 917 (Ala. 1997) 2

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 3

Statutes

ALA. CODE § 8-19-7(3) 9

ALA. CODE § 27-18-8 4

ALA. INS. REG. NO. 28, § II(C)(1) 4

REPLY BRIEF FOR THE PETITIONER

We contended in the petition that, in an evident effort to salvage as much as possible of the judgment in this case, the Alabama Supreme Court performed major surgery on *BMW*. The certiorari petition in *Ford Motor Co. v. Sperau,* No. 97-1391 (filed Feb. 24, 1998) shows that this is not an isolated problem. Respondent here claims (Opp. 9) that the Alabama Supreme Court's dismantling of *BMW* should be immune from scrutiny unless this Court is prepared "to engage in de novo review of every damages award to examine each defendant's plea that he or she was wholly innocent and that the damages are excessive." This is fatuous. By granting one petition, the Court does not obligate itself to grant every other petition on a similar subject. The question always is whether review in the particular case will illuminate the law in important respects or is needed to maintain judicial discipline.

Moreover, few cases involve the kind of insubordination exhibited here — outright refusal to apply the comparative fines guidepost; evasion of the ratio guidepost by indulgence of a post hoc, foundationless assumption that the jury found substantial mental anguish damages (which, to the extent they exist at all, were caused by the bank and have been more than satisfied by the bank's post-trial payment of $1 million); and dilution of the reprehensibility guidepost by abandonment of any pretense of gauging the ***degree*** of reprehensibility of the defendant's conduct. Review is warranted to ensure that the Court's mandate to reconsider this case in light of *BMW* is not flouted in this way and that the lower courts perceive no weakening of this Court's commitment to "the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides" (*BMW,* 116 S. Ct. at 1609 (Breyer, J., concurring)).

Putting to one side the deleterious effect of declining to correct the Alabama Supreme Court's refusal to heed this Court's "admonition" (Pet. App. 12a (Hooper, C.J., dissenting)) and continued failure to apply the relevant factors in a way that will produce predictable, non-arbitrary results (*id.* at 15a (See, J., dissenting)), this case is a particularly good candidate for review because it affords the Court the opportunity to continue the didactic process begun in *BMW* by providing needed guidance on such issues as (i) the interplay between common law principles of vicarious liability and the constitutional requirement that punishment

be related to culpability; (ii) the determination of when a punitive award is excessive in relation to actual and potential injury; (iii) the extent to which courts are free to disregard legislatively established fines because they consider them to be "meager"; and (iv) when it is justifiable to permit a punitive exaction that is many times any profit conceivably derived from the alleged misconduct.

ARGUMENT

For all her righteous defense of the Alabama Supreme Court (*e.g.*, Opp. 23), respondent does not even attempt to explain why a punishment of (at least) $750,000 is warranted in a case of vicarious liability for an isolated act that deceived Union Security itself and that could have benefitted it, if at all, by no more than a few hundred dollars. Respondent's assertion (Opp. 11) that the Alabama Supreme Court "faithfully applied" the *BMW* guideposts is nothing more than empty lawyer's rhetoric.[1]

1. *Reprehensibility.* Respondent ignores the fact that Taylor's tort was an isolated incident. She ignores the absence of evidence of any deliberate misconduct on Union Security's part. She ignores the "absence of a history of noncompliance" and hence the absence of a "basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance" (*BMW*, 116 S. Ct. at 1603). The arguments she does make rely on inaccurate facts and, in any event, do not explain why this vicariously liable defendant/victim should suffer a penalty upwards of $750,000.

a. Respondent first argues (Opp. 11-12) that our contention that Union Security did nothing wrong is "irrelevant" because under *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), Union

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[1] Citing the remittiturs in this and several other cases (Opp. 24-25), respondent asserts (Opp. 24) that the Alabama Supreme Court in fact has been engaging in "stringent" review of punitive damages awards after *BMW*. But as the petitions in this case and *Ford* (cited by respondent at Opp. 25) amply demonstrate, the presence of a substantial remittitur in no way means that the review was "stringent" or the remittitur adequate. We are confident that if the Court reads the other decisions cited by respondent — particularly *American Pioneer* and *Talent Tree* — the inadequacy of the review afforded by the Alabama Supreme Court will be clear.

Security may be held "fully liable" for punitive damages under the doctrine of *respondeat superior*.[2] But the question in those cases was whether a defendant can constitutionally be ***liable*** for punishment under a theory of *respondeat superior*. See *Haslip*, 499 U. S. at 15; *Yeldell*, 274 U.S. at 115. In answering that question in the affirmative, the Court did not say that the fact that the defendant itself committed no wrongdoing should be ignored in reviewing the amount of the punishment. As we pointed out in the petition, at least one Justice has since indicated that cases of vicarious liability are distinguishable from, and generally warrant lower punishment than, cases involving misconduct of the defendant's management. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring).[3]

Respondent apparently recognizes no distinction between liability and amount of punitive damages. In her view, a principal may be subject to sky's-the-limit punitive damages, so long as the agent's conduct is egregious — even if the agent's conduct is *ultra vires* and even if that conduct was more likely to harm the principal than benefit it. This is a dubious proposition indeed, and serves only to highlight the appropriateness of this case for addressing the important and recurring issue of the proper measure of punitive damages in cases of vicarious liability.

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[2] In attempting to portray Taylor as an egregious wrongdoer, respondent takes unwarranted liberties with the record. For instance, she suggests (Opp. 3) that she agreed to purchase credit life insurance only after Taylor told her that she had to. In fact, however, respondent herself testified that she wanted credit life insurance and that she had it on her other loans. R. 572-573. Even more misleading is the insinuation (Opp. 6) that Taylor admitted that he did not ask the Crockers the health questions because he knew that a "yes" answer would result in denial of coverage. What Taylor actually said is that he was sure that he ***did*** ask the questions and that the ***Crockers*** answered no to them all because otherwise Taylor would have "discontinued the credit life [application]." R. 508-509. See also R. 504-506, 522.

[3] Moreover, the present case is distinguishable from *Haslip* because here, unlike in *Haslip*, the wrongdoer simultaneously and primarily served a separate, more culpable, master — the bank — that stood to profit from his misconduct.

b. Respondent admits (Opp. 14) that the Alabama Supreme Court's remand decision rests entirely on vicarious liability for Sammy Taylor's *ultra vires* conduct. No doubt uncomfortable with the rationality of relying on the doctrine of *respondeat superior* to support a punishment of the magnitude involved here, however, she claims (*ibid.*) that, in its initial opinion, the Alabama Supreme Court found that Union Security was guilty of what she labels "affirmative misconduct." But there was good reason for the court to abandon these alleged findings on remand, when they were demonstrated to be both legally and factually flawed. Although it should not be necessary for us to refute assertions that were implicitly rejected by the court below, we address them briefly to eliminate any doubt regarding the basis of liability in this case.

Respondent leads off by noting (Opp. 14-15) that Union Security does not issue policies to its covered debtors, which, she asserts, makes it easier to deceive insureds about the consequences of signing an inaccurate Health Statement. Respondent further contends that Union Security's practices were in violation of Alabama's insurance regulations. These claims are flatly wrong, both legally and factually.

The law is clear that when, as here, the policy is a ***group*** policy, the insurer may issue the policy itself to the group policy holder — here, First Alabama. See ALA. INS. REG. NO. 28, § II(C)(1). Because the insurer has no direct relationship with the covered debtor, state law directs the insurer to provide the creditor with certificates of insurance, which the creditor in turn is to give to its insured debtors. ALA. CODE § 27-18-8.[4] The record is unequivocal that Union Security supplied certificates of insurance to First Alabama, and that, unbeknownst to Union Security (and in

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[4] Respondent misrepresents the record in claiming (Opp. 15) that the trial court held that Union Security had the obligation under state law to deliver the certificates to covered debtors. During the charge conference, the trial court said to Union Security's counsel: "I'm not saying you may not have — may not have complied with [the Alabama statute], but it hasn't been complied with because there wasn't any delivery to each debtor insured under the policy." R. 811. Plainly, the import of this statement is that First Alabama—Choctaw, not Union Security, had breached the state-law delivery obligation.

direct contravention of its expectations (see R. 326-327, 448) as well as those of First Alabama (see R. 746-747)), the president of First Alabama—Choctaw made the ***unilateral*** decision not to send certificates of insurance to covered debtors (R. 747-748). In short, Union Security complied fully with Alabama law, and the actions of its co-defendant do not show *mens rea* on Union Security's part.

Ultimately recognizing the weakness of her claim of affirmative misconduct relating to non-delivery of the certificate of insurance, respondent falls back on the assertion that First Alabama was Union Security's agent. Opp. 15. Needless to say, that argument confirms our contention that the punishment cannot be justified by reference to Union Security's own conduct. And where, as here, the agent acted out of its own self-interest, with deception and disloyalty toward its principal, and has been punished for its misconduct, no rational purpose can possibly be served by severely punishing the otherwise innocent principal/victim.

Respondent next attempts to revive the Alabama Supreme Court's abandoned attack on "post-claim underwriting," asserting (Opp. 15-16) that "[p]rior to an application for credit life being approved, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement"[5] and that "the great majority of claim denials

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[5] It warrants reiterating that, even before Union Security had any reason to know that Mr. Crocker had signed an inaccurate Health Statement, it revised the form to warn specifically that "[u]ntruthful answers may result in denial of claims." C. 1919. The assertion that Union Security undertook "no safeguards whatsoever" is thus totally false. And quite apart from any warning, one would think that relying on the applicant to review the form — which is simply a one-page list of medical conditions with "Yes" and "No" boxes — and sign it only if it is accurate should be an adequate safeguard against inadvertent or deliberate errors on the part of the agent. The only individuals who would not be fully protected by this safeguard are those who either knowingly make false statements on their applications or carelessly sign applications containing false statements written in by their agent. Given the number of applications submitted every year, it is hardly surprising that the Alabama legislature and insurance regulators have not required insurers to check the accuracy of every application merely to protect the tiny fraction of individuals who fall

result from post-claim investigation of the health statements." Unlike the court below, respondent appears oblivious to the fact that, both at the time Union Security issued coverage to the Crockers and even now, Alabama positive law ***authorized*** post-claim underwriting.[6] She also ignores the undisputed testimony that Union Security pays over 99% of the claims it receives — a fact that vitiates her claim (Opp. 17) that "by employing lax screening procedures" Union Security has achieved "unusually profitable loss ratios"[7] and, at the same time, supplies the explanation for why post-claim underwriting is an efficiency-enhancing, cost-containing practice that should be encouraged, not punished.

Respondent asserts elsewhere in her opposition (at 2) that Union Security "adopted a deliberate corporate policy that facilitated the commission of fraudulent acts by its agents." As her failure to

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in these groups.

[6] Respondent professes to find "puzzling" our contention that basing punishment on an after-the-fact condemnation of post-claim underwriting would violate Union Security's due process right to fair notice. Opp. 17 n.4. However, because at the time of the conduct (and even now) Alabama positive law affirmatively permitted post-claim underwriting, it is plainly unconstitutional to punish Union Security even one dime for engaging in that practice. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.").

[7] Although respondent's "profit" argument is misguided for the reason mentioned in the text, it is in any event clear that the loss ratios she cites bear no discernible relation to profits, for they take no account of the cost of selling and administering the insurance. Moreover, respondent has never shown (and could not show) a causal link between Union Security's loss ratios and its practice of deferring investigation until after a suspicious claim is made. If Union Security were to investigate the accuracy of every Health Statement before issuing coverage, that would increase its costs, which in turn would be passed on to its insureds in the form of higher premiums. Ironically, this would make Union Security's loss ratios even ***lower***, because those ratios measure only the percentage of premium revenues paid out in claims and take no account of the cost of generating those premiums.

cite anything for this assertion suggests, there is not a whit of evidence that Union Security had such a policy. Nor was there evidence that Taylor or any other agent ***ever*** had engaged in a fraudulent act other than the one charged here. Indeed, as the trial court and Alabama Supreme Court both repeatedly observed, the alleged fraud on Taylor's part was "an isolated incident."

Respondent also misleadingly states (Opp. 8) that Union Security "took no steps to ensure that a refund of the insurance premium was made." It is undisputed, however, that Union Security instructed First Alabama—Choctaw to refund the premium. R. 346-347, 739. The ***bank*** may have been negligent in failing to carry out its responsibility, but that hardly constitutes "affirmative misconduct" on the part of Union Security.

Finally, citing the fact that Union Security did not discipline Taylor, respondent argues (Opp. 18) that Union Security's "lack of contrition" makes its conduct "all the more reprehensible." Of course, Taylor was the bank's employee, and was Union Security's agent only in the most technical sense. In any event, the fact that Union Security chose to believe an individual with an otherwise unblemished record is nothing more than a judgment call and is hardly the stuff of a near seven-figure punishment.

c. Like the Alabama Supreme Court, respondent asserts (Opp. 18-20) that the conduct in this case was inherently reprehensible because it threatened her financial security, causing her mental anguish. But unless the denial of an insurance claim is *per se* reprehensible, this argument affords no basis for characterizing Union Security's conduct as reprehensible at all, let alone heinous enough to warrant the large punishment at issue here. All Union Security did was to deny a claim under a policy procured by fraud; even accepting that the Crockers were innocent co-victims of the fraud and that the misconduct was (unbeknownst to Union Security) that of the bank's officer, Union Security's conduct was entirely proper in the circumstances.

The source identified by the court below for respondent's alleged mental anguish was the ***bank's*** letter threatening to send the file to its lawyers. Union Security had no role in drafting that letter or in the decision to send it shortly before Christmas. Thus, any

mental distress caused by the bank's unilateral action cannot logically make Union Security's conduct more reprehensible.[8]

2. *Ratio*. Aside from repeating the Alabama Supreme Court's analysis, respondent has nothing to say about the ratio guidepost. In particular, she makes no effort to identify what she and the court assert to be the "compelling evidence of Mrs. Crocker's emotional and mental distress" (see Opp. 21). As we explained in the petition (at 22-23), there is no such evidence.[9]

Respondent also does not quarrel with the premise (see Pet. 23) that the verdict may not be sustained on the basis of facts not before the jury. She instead asserts (Opp. 20) that no facts were needed because her distress was "self-evident." While Alabama may be free to allow juries to award ***some*** amount of compensation for "self-evident" mental distress, the assumption that ***this*** jury awarded the ***largest*** amount of such damages that would be legally tolerable — $250,000, according to Justice Houston — without the benefit of any evidence of such distress is untenable. It is especially inappropriate here, where the conduct that allegedly caused the bulk of any distress was the independent, intervening act of the bank in its debt collection effort.

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[8] Respondent asserts (Opp. 20) that there is no evidence to "substantiate" our "claim" that Taylor was not acting for Union Security when he sent her the letter urging her to clear the arrearage — a matter in which Union Security had no interest whatever. But the burden of proof was on respondent, not Union Security. If there were any evidence to support the illogical proposition that creditors act on behalf of insurers when seeking to collect on overdue loans, it was up to respondent to adduce it.

[9] Respondent asserts (Opp. 20 n.5) that it is "inconsistent" for us to make this argument having succeeded in preventing her from making self-serving statements about her "mental operation[s]." But had she actually suffered any significant degree of mental anguish, there were ways for her to establish that. For example, if she had suffered from loss of sleep or eating problems as a consequence of this experience, she could have so testified; such testimony does not involve simply "mental operation[s]." Similarly, if her distress had required her to consult a doctor or therapist, or to take prescription medication, nothing would have prevented her from telling the jury.

Finally, respondent ignores our contention (Pet. 23-25) that the ratio analysis does not end with a comparison of the punitive damages to whatever inflated compensatory award the state courts ultimately uphold, but also includes a comparison with the hard economic damages. Here that comparison reveals a gigantic disproportionality.

3. *Legislatively established penalties for comparable misconduct.* Respondent's argument regarding this guidepost is as wrongheaded as the Alabama Supreme Court's refusal to apply it. Respondent argues (Opp. 25-26) that the punishment in this case is "fully supported" by the treble damages remedy provided under Alabama's Deceptive Trade Practices Act (DTPA) and takes us to task for failing to cite the DTPA in our petition. But the DTPA does not apply to insurance transactions (ALA. CODE § 8-19-7(3)) for the obvious reason that they are specifically regulated under the Insurance Code. Moreover, even assuming applicability of the DTPA and accepting *arguendo* that the private remedy (as opposed to the Act's $2,000 administrative fine) is the appropriate referent for purposes of this inquiry, that treble damages remedy in no way supports the near seven-digit punishment authorized by the Alabama Supreme Court. In the very case cited by respondent, the Alabama Supreme Court computed the DTPA treble damages remedy using only the "actual economic damage" found by the jury, not the plaintiffs' overall compensatory award, which included mental anguish damages. See *Ford Motor Co. v. Sperau*, 1997 WL 545878, at *12 (Ala. Sept. 5, 1997). Thus, the DTPA's treble damages provision suggests an award in the range of $50,000, not the $750,000 to $1,000,000 awarded here; the DTPA accordingly undermines rather than supports the result below.

Respondent also defends the Alabama Supreme Court's refusal to apply the third *BMW* guidepost at all, claiming (Opp. 26-28) that the Alabama courts have decided that the insurance laws are inadequate and that therefore they, and not the legislature, will be in charge of policing insurance fraud. This argument is a model of circularity. It boils down to the contention that, whenever the Alabama courts don't like the result that consulting applicable fines will suggest, they may simply usurp the legislature and declare

themselves responsible for policing that area of law.[10] Perhaps the federal Constitution would permit state courts to do this prospectively; but because the purpose of the third *BMW* guidepost is to assist the reviewing court in determining whether the defendant had adequate notice of the magnitude of the punishment to which it could be subjected (*BMW*, 116 S. Ct. at 1603), courts may not facilely evade it merely by retrospectively announcing that statutory penalties do not reflect state policy.

4. *Profit.* Respondent does not even acknowledge, let alone answer, our argument that the punitive damages in this case are utterly disproportionate to any ill-gotten gain (which, because this case involves an isolated incident, could not be more than a few hundred dollars). Instead, she suggests that Union Security should be grateful that the Alabama Supreme Court considered two additional factors — Union Security's financial condition and the costs of litigation — to justify cutting the judgment in half, thus going "*beyond* this Court's mandate in *BMW*" to protect Union Security. Opp. 24 (emphasis in original). Needless to say, the court's consideration of two factors hardly excuses its inadequate treatment of the other factors.[11]

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[10] Respondent misleadingly asserts (Opp. 26-27) that the Alabama Supreme Court's refusal to apply the third guidepost is unique to the insurance area. In fact, the court first refused to apply the guidepost in the *BMW* remand. See *BMW of North America, Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997). There can be no question from the court's refusal to apply the guidepost in *BMW* itself that the Alabama Supreme Court intends to ignore it in every case in which the fine for comparable conduct is, in its view, "meager."

[11] The Alabama Supreme Court's treatment of financial condition and litigation costs was in any event far from adequate. For example, given the $1 million recovery that respondent obtained from the principal wrongdoer, it is impossible to understand how her litigation costs could support any significant punitive damages against Union Security.

Respectfully submitted.

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